No. 11992.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

POWER SERVICE CORPORATION, A CORPORATION,
APPELLANT,

VS.

W. E. JOSLIN, DOING BUSINESS AS CORY-JOSLIN
AND MACNSONS, APPELLEE.

APPELLANT'S OPENING BRIEF.

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October 25, 1948.

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I.

STATEMENT OF VENUE AND JURISDICTION.

1. This is an appeal from the District Court of the United States for the Northern District of California, Southern Division, and involves a claim for damages in the amount of $34,343.00. The jurisdiction of this court is invoked under 28 USCA 225 of the Old Code, and under Secs. 1291 and 1294 of the New Federal Judicial Code.

2. The decision of the District Court was rendered and entered on May 7, 1948 (R. 108) and the case was brought to this Court by a Notice of Appeal filed with said District Court on May 27, 1948 (R. 109). Appellant's Statement of Points was served upon the opposite party by

registered mail on May 26, 1948 (R. 112) and filed in the District Court on May 27, 1948 (R. 110).

3. The appellant is a Minnesota corporation. The appellee is a resident of San Francisco, California. The venue of the action, therefore, is in the said District Court. Old Code, 28 USCA Sec. 12; Sec. 1391(a) New Federal Judicial Code. Count I seeks a declaratory judgment and coercive relief in the amount of $34,343.00. Jurisdiction for declaratory relief is given by 28 USCA 400 of the Old Code; Sec. 2201 of the New Federal Judicial Code. Count III seeks recovery of $34,343.00, which gives the said District Court jurisdiction. 28 USCA 41(1) Old Code; Sec. 1332(a)(1), New Federal Judicial Code.

II.

OPINION BELOW.

The opinion of the District Court is officially reported in 76 F. Supp. 694, and appears in the Record at pages 52, 81.

III.

CONCISE STATEMENT OF THE CASE.

Nature of the Case. This cause involves a claim for damages in the amount of $34,343.00 for delay in furnishing materials for the performance of a construction subcontract. Appellant alleges the delay to have been caused by the failure of the appellee to deliver materials at the site of the project at the time required by the construction schedule.

The Pleadings. The petition is in three counts. Count I seeks a declaration of rights under the contract as made.

In the alternative, if the declaration should be adverse, Count II seeks reformation of the contract to make it express the intention of the parties, and Count III seeks recovery on the contract if and as reformed. (R. 2).

The Answer (R. 47) in addition to appropriate admissions and denials, alleges that the action is barred by:

(a) Estoppel

(b) Release

(c) Statute of frauds

(d) Waiver

(e) No consideration for "damage clause" on the signature page.

The "no consideration" defense was added as an amendment to the original answer during the trial. (R. 51).

The Court found for the appellant on Count I, for the appellant on all of the issues raised by the answer, dismissed Counts II and III and assessed appellant's damages at the sum of $3,753.15. The appeal (by the plaintiff below) is from that part of the judgment awarding damages to appellant.

The principal question raised by this appeal is the legal measure of damages to be applied to the facts. Before that question was reached for decision by the District Court, however, the appellee raised the preliminary issue that recovery could not be had in any event for an amount in excess of $10,008.70. Appellee's theory was that the receipt executed by appellant for $1,000.00, dated March 18, 1946, limited appellant's damages to $10,008.70, the amount specified in its claim of June 30, 1945 (Ex. 35).

On this issue the District Court decided that appellant could not recover in excess of $10,008.70, and that it could not recover on any element of damages not included in its claim of June 30, 1945. (Conclusions of Law 6 and 7, R. 107). Appellant asserts, on the ultimate question as to the measure of damages, that the District Court does not follow the evidence as to the amount of damages; that it does not apply any measure that is customarily applied by the courts in determining damages for breach of construction contracts.

Instead, in arriving at its decision, the Court concludes:

1. That the maximum amount of recovery is limited to $10,008.70.

2. That the appellant was delayed 15 days on account of non-delivery of materials.

3. That the contract was completed 40 days late, and

4. That, therefore, appellant was entitled to recover 15/40ths of $10,008.70, or $3,753.15 as its damages.

Appellant contends —

1. That the amount of recovery is not limited to $10,008.70.

2. That it was delayed *39 days* in the performance of its contract, and

3. That the evidence establishes, under the measures usually adopted by the courts, damages in the amount of $34,326.88.

For the most part these contentions present questions of law. As its Statement of Facts appellant adopts that part of the factual statement of the District Court con-

tained in the opinion (R. 60, 70, incl.) and its Findings of Fact (R. 89, 100 incl.) (with Record references added) which reads as follows:

Prior to this contract a general contract was entered into on March 25, 1942, and was designated as "Contract No. W461-eng-10274," between the United States of America and Wm. L. Lozier, Inc., Broderick and Gordon; it was what is known as a "cost-plus-a-fixed-fee" contract. It covered the erection of the Sunflower Ordnance Works near Kansas City.

On September 1, 1942, a subcontract, known as "F F Construction Subcontract No. 5," was entered into between Architect-Engineer-Manager, hereinafter designated as A-E-M, and W. E. Joslin, an individual of the City of San Francisco, California, doing business as Cory-Joslin and Macnsons, for the installation of the plumbing, heating and ventilating facilities at the Sunflower Ordnance Works. This contract was also a "cost-plus-a-fixed-fee" contract. Later the subcontract in question here was entered into between the appellant and appellee.

Leading up to this Subcontract, an invitation to bid was prepared by C. Howard Murphy, Manager of the Subcontract Department of the A-E-M. It consisted of a letter, with a copy of the specifications attached.

Bids were opened July 8. Appellant's bid was prepared and was submitted on July 8. Appellant, the low bidder, at $448,000 lump sum bid, was awarded the contract on July 13. This bid covered only the cost of erection. All installation materials and equipment, of an approximate value of $1,145,000, were to be furnished by the appellee, or by those with whom he was contracting, directly or indirectly. Notice to proceed was immediately mailed to and received by appellant on July 13.

As soon as the award was made to appellant the subcontract department of the A-E-M, through C. Howard Murphy, its manager, prepared a formal subcontract and mailed it to appellant for its signature on July 14. Appellant refused to sign the subcontract as prepared because it provided for completion in 120 days without including any provisions to compensate the appellant for damages if delay in performance should result from the shortages of materials. Several weeks went by during which the parties were negotiating in person and by letter with respect to an increase in cost if performance should be delayed, and with respect to a clause in the contract to protect appellant against damages in case of delay.

On August 3, (Ex. 7, R. 713) appellant wrote appellee that a predicted delay of six weeks would require an increase in the contract price to cover the following items:

Increase in actual costs	$34,343.00
SSOA Bldrs. Risk Bond	1,888.00
Margin 15%	5,151.00
Total price adjustment on account of delay	$41,382.00

On August 4, this proposal was given to the A-E-M. On the same date A-E-M advised appellee that no recommendation could be made for additional compensation at that time. (Ex. 8).

On August 8, (Ex. 9, R. 588) appellant submitted to appellee a letter requesting that there be appended to the signature sheet of the formal contract the following proviso:

> "Water wall and roof boiler tubes, which were to have been furnished by the Constructor and available to the subconstructor immediately he was directed to proceed were not and are not as of date of contract

so available. This contract is above executed by the Subconstructor reserving full rights of recourse to claims for extension of time, and for reimbursement of such increased cost as may be occasioned by non-availability of these above mentioned materials, which were represented in bidding information to be at the site as of date of direction to proceed."

On August 17, appellee wrote appellant the paragraph suggested in appellant's letter of August 8 was not acceptable. (Ex. 11).

On August 22, (Ex. 16) appellant requested the appellee to state in a letter to appellant whether a claim for reimbursement of its increased costs would be valid or invalid under the terms of the contract submitted to appellant for signature if there should be proven to be:

(a) An increase in the subcontractor's cost because of delay in delivery of materials, if he prosecutes the work without due regard to economy in order to complete as early as possible; or

(b) An increase of the period of construction beyond 120 days, for the reason of delayed delivery of materials.

On August 31, (Ex. 18) appellee declined to write such a letter, but indicated that a contract might be approved with a proper reservation on the signature page. Thereafter, on September 11, 1944, there was added to the signature page of the formal contract, before the contract was executed, a clause which was initialed by all of the parties to the contract as follows:

"This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05." (Ex. 2)

Performance commenced with the preparation of the inventory required under paragraph 5-04 (b). (R. 123). This inventory took more than eight weeks to complete. (Ex. 19, R. 124).

No verbal representation was made by anyone to appellant in respect to the tubes and headers, as to whether they were or were not in storage. The only representation in this respect is contained in paragraph 5-04(c) of the specifications wherein it is provided:

> "Nearly all of the materials required for the work has been stored in Power House No. 1, or in warehouses adjacent thereto."

By July 26, appellant had progressed to the point in the preparation of the field inventory where it appeared certain that there was a major shortage of materials, — tubes and headers — that would delay the progress of the work beyond the contract schedule of 120 days. (R. 132). Accordingly on that date appellant notified the appellee in writing of the shortages. (Ex. 4, R. 131). Appellee immediately referred this letter to the A-E-M which replied in a letter signed by J. S. Hagan, Chief Engineer, on July 29, that the shortage would not delay the work. (Ex. 6, R. 133).

On August 17, (Ex. 12, R. 165) and again on August 19, (Ex. 13, R. 166) appellant confirmed shortages of tubes and headers. At the same time these shortages were specifically called to the attention of Elmer Bennett, representative of the Combustion Engineering Company who had been sent to the job by his employer to expedite performance. (R. 164).

On August 19, appellant, through its representative Ralph Jung, suggested that appellant go on record with a letter stating certain facts encountered in installing water

wall tubes. (Ex. 14, R. 169). Such a letter was written on August 29. (Ex. 17, R. 169). On August 22, (Ex. 15, R. 180) appellant wrote appellee that certain water wall headers had been improperly manufactured and would be unfit for use under the contract.

Neither appellant nor appellee had any control over procuring any of the materials that the appellee was required to furnish. The tubes themselves were furnished by the Combustion Engineering Company, although manufactured by a steel or tube mill such, for example, as the Republic Steel Corporation, or the Globe Tube Company, or any one of a dozen similar mills. However, these tubes had been shipped to the Combustion Engineering factory where they were cut to length, bent to a definite shape and parts were welded on so as to make a complete unit of a tube to fit in a definite location in the boiler unit that was designed especially for the Sunflower Ordnance Project. In fact, the particular water wall tubes which were used at Sunflower were designed, manufactured and furnished by the Combustion Engineering Company under patents which were solely owned by that Company. There was no place else in the United States where these tubes could be obtained other than from the Combustion Engineering Company. (R. 163). It was not possible, therefore, for any of the contracting parties, or others, to go on the open market and purchase the tubes needed. They were manufactured for this particular unit or for units like it only by the Combustion Engineering Company.

The next step was to prepare a Schedule of progress, or construction schedule, for approval by the Contracting Officer of the Government. Appellant's original schedule was furnished prior to July 24, (R. 128, 129) but criticisms resulted in a revision on August 17, (R. 129) and it was approved on August 22. This schedule was brought up to

date each week. (Exs. 50 to 64, incl., R. 146). From this schedule the contracting parties were able to determine the exact date on which essential materials such as tubes and headers were required for the orderly prosecution of the contract. It was approved as reasonable by all of the parties concerned, including the Government and the appellee. (R. 147, 148, 193).

There were three units, identical in character, upon which identical operations were to be performed. The normal procedure followed by the plaintiff in the erection of such units was to do the work on unit one, then move to number two and repeat and then to unit number three. (R. 313, 314). The construction crew could work more efficiently on the second and third units due to increased familiarity with the exact operations required. (R. 318). The steps in which a contractor must proceed to attain maximum efficiency in the construction of these units are:

(a) Line and place boiler drums in final position. (R. 152).

(b) Install the tubes for the boiler proper and the water tubes.

(c) Install the air heater tubes in a position back of the boiler, in a separate unit, so to speak.

(d) Place a hydrostatic test on the boiler and water tubes.

(e) Install the boiler brick work, insulation and casing.

(f) Erect the pulverized coal burner and duct work.

(g) Install drum internals and boiler appurtenances such as safety valves, steam gauges and water columns; install the instruments and combustion control, the sen-

sitive part of the work, such as small tubes, fittings and miscellaneous apparatus that control the function of the unit; install the recording instruments that record the steam pressure, steam temperature and the flue gas as it leaves the boiler; install the apparatus that controls the supply of coal to the unit, and the supply of air for combustion in proportion to the load or demand on the unit. (R. 153).

(h) The final phase is what appellant calls the "drying out" fire. A slow wood fire is put in the boiler and left for a week to dry out the insulation, the mortar that is in the brick work and in the jacket. At that time the oil and grease that has accumulated in the erection of the work is cleaned out so the boiler is entirely clean before it goes into service. This is followed by a period of adjustment, trial, inspection and operation. That was the sequence in operation.

In estimating for the bid on this job, appellant contemplated that the various operations would be done in sequence. (R. 155, 156). This method is recognized by all contractors and by manufacturer's representatives as being normal and orderly. The design of the unit as a whole by the builder is predicated on the assumption that it will be erected in a normal sequence of procedure. Such a method results in labor saving and time saving. (R. 156).

The only materials that it is claimed delayed the construction program were namely: The water wall tubes and water wall headers. (R. 174, 176 incl.; 180, 183, incl.; 369, 384, 387). Appellant's proposal and construction schedule, to meet the contract conditions required that these items were to be on the job and available for installation when needed. The installation of the water wall tubes should be done early in the erection program and their installation

must be completed before the erector can proceed with the hydrostatic tests, the erection of the boiler brickwork and casing, boiler piping, combustion control and boiler trim.

After being awarded the contract, and while taking inventory of the boiler materials, it was discovered that these shortages existed. No one employed by the appellee was aware of this shortage until after the contract had been awarded, although it was definitely known in the Engineering Department of the A-E-M. In the time allowed for the preparation of bid, it would have been impossible for any bidder to have determined by observation prior to the letting, whether or not there was a shortage of this material, because to have done so would have required the moving and handling of several hundred tons of materials and would have required much more time than was available. The only delay was occasioned by shortages of the water wall tubes and headers.

An inspection was made almost daily by representatives of the A-E-M and the Government. No complaint was made by these inspectors verbally or in writing to any representative of the appellant.

Claim for damages. The contract called for completion on November 10, 1944. (R. 121). It was actually completed on December 19, 1944. On February 21, 1945, appellant submitted a claim for damages in the amount of $9,323.02 (Ex. 29, R. 208). On June 30, 1945, an amended claim for $10,008.70 was presented (Ex. 35, R. 224). In each instance the claim enumerated only two items of damages, to-wit:

(a) The increased cost of renting equipment.

(b) The increased cost of supervisory personnel.

In each instance the claim did not include the following additional elements or items of damage that are now included in the complaint, to-wit:

(a) Cost of 90 days extra time by Borst.

(b) Home office overhead for 39 days.

(c) Increased cost of labor, caused by delay in the delivery of materials.

On March 3, 1945, the appellee acknowledged receipt of the claim for $10,008.70 and made no denial of appellant's right to damages in that amount and requested additional data. (Ex. 31, R. 214). On July 11, 1945, the appellee denied the claim, not on the ground that appellant was not entitled to damages, but on the ground that he was unable to determine the amount to which appellant was entitled. Specifically the appellee's letter reads:

> "* * * Please be advised that Cory-Joslin & Macnsons has made a careful study of the facts stated in all of the foregoing letters, as a result of which Cory-Joslin & Macnsons is unable to determine, first, the actual number of days delay, if any, chargeable to the alleged delayed delivery of waterwall tubes and proper waterwall headers; second, the true and correct amount of your claim; and third, the part of your claim, if any, properly chargeable to the alleged delay of delivery of said materials.
>
> "Accordingly, Cory-Joslin & Macnsons is herewith denying your claims and both of them in their entirety." (Ex. 36, R. 230).

Appellant held the opinion, under the "disputes" provision of the contract, that it would be necessary to submit its claim to and obtain the opinion of the Chief of Engineers at Washington. Accordingly, the Government Contracting Officer made a detailed examination of the facts (Ex. 44, R. 251). These findings, with appellant's claim dated Sep-

tember 29, 1945, were forwarded to the office of the Chief of Engineers, Washington. On March 12, 1946, the Chief of Engineers ruled that he had no authority to pass upon the appellant's claim because it was a claim for unliquidated damages resulting from an alleged breach of contract which is recoverable in a judicial proceeding and not through administrative procedure. (Ex. 45)

On March 18, 1946, appellant was paid $1,000.00 and receipted in full under its contract. Appellant accepted the $1,000.00 and receipted in the following language: (Ex. 46)

> "March 18, 1946. Power Service Corporation, 711 Wesley Temple Bldg., Minneapolis, Minn.
>
> "Final payment on subcontract F.F. No. 5 to Government Contract No. W-461-Eng-10274 $1,000.00.
>
> "Payment in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision.
>
> POWER SERVICE CORP.,
>
> (Seal) P. C. GAFFNEY,
>
> Treasurer."

On June 19, 1946, the present action was instituted.

Exhibits. All original exhibits have been brought up for the inspection of this Court by order of the District Court. (R. 113). Because of the number and nature of the exhibits, Judge Denman ordered that the printing of these exhibits be dispensed with, and that counsel be allowed to refer in the Record, Brief and Argument to the original exhibits. (R. 790)

IV.

SPECIFICATIONS OF ERRORS RELIED UPON.

The errors relied upon and intended to be urged by appellant are that the District Court erred:

1. In awarding appellant damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars ($3,753.15) instead of in the amount of damages established by the evidence, to-wit, the sum of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars ($34,326.88).

2. In its Findings of Fact No. 32 holding that appellant was delayed only two days on Boiler No. 1, instead of sixteen days as shown by the evidence.

3. In its Findings of Fact No. 33, holding that appellant was delayed only seven days on Boiler No. 2, instead of thirty-eight days as shown by the evidence.

4. In its Findings of Fact No. 34, holding that appellant was delayed only six days on Boiler No. 3, instead of forty-four days as shown by the evidence.

5. In its Findings of Fact No. 35, holding that appellant was delayed a total of only fifteen days in completing its contract, and in the court's failure to find from the evidence that the appellant was delayed from November 10, 1944, to December 19, 1944, a total of thirty-nine days.

6. In its Findings of Fact No. 39, in which the court arbitrarily determined that the loss to appellant amounted to Two Hundred Fifty & 21/100 Dollars ($250.21) daily, and in its failure to find from the evidence that the total damages amounted to Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars ($34,326.88) made up of the following distinct and clearly established items of damages, to-wit:

Item 1: Extra cost of equipment rental	$2,255.50
Item 2: Extra cost of Supervisory personnel (except Borst)	8,267.53
Item 3: Extra cost of 90 days additional time and expense — Borst	2,542.31
Item 4: Home Office overhead	6,649.82
Item 5: Loss in Efficiency	14,611.72
	$34,326.88

7. In its Conclusion of Law No. 5 insofar as the court held that appellant's damages were limited to the amount set forth in its amended claim.

8. In its Conclusion of Law No. 6, holding that appellant could not recover in excess of $10,008.70, being the amount specified in its original claim dated June 30, 1945 (Plaintiff's Exhibit 35).

9. In its Conclusion of Law No. 7, holding that appellant could not recover on any element of damages not included in its claim of June 30, 1945.

10. In that part of its Conclusion of Law No. 9, which held that appellant was entitled only to recover damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars ($3,753.15), instead of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars ($34,326.88), as established by the evidence.

11. By disallowing, in its computation of damages, all overhead expenses established by the evidence, to-wit, the sum of Six Thousand Six Hundred Forty-nine & 82/100 Dollars ($6,649.82).

12. In that its opinion and decree are not supported by evidence and are contrary to law.

13. In that its opinion and decree are not supported by its Findings of Fact.

14. In that its opinion and decree are contrary to its Findings of Fact and the law.

15. In that its decree as to the amount of delay and the measure of damages is clearly erroneous and is not based upon substantial evidence.

V.

SUMMARY OF ARGUMENT.

1. Damages may be recovered in excess of the claim originally filed.

2. The court is bound by the Contracting Officer's Findings of Fact on the question as to the amount of the delay.

3. Independently of the Contracting Officer's Findings of Fact the record affirmatively shows clearly that the appellant was delayed thirty-nine days.

4. The court failed to apply the correct measure of damages.

VI.

ARGUMENT.

A. **Preliminary Questions.** (1) **May appellant recover in excess of $10,008.70?** The principal issue before the Court is the amount of damages to which appellant is entitled on the record. At the threshold of this question, however, we encounter the preliminary question — "Can damages be recovered in excess of the claim originally submitted by appellant on June 30, 1945?" (Ex. 35, R. 225). The answer to this question is "Yes." That part of the appellee's Answer, based upon the receipt of March 18, 1946, (Ex. 46, R. 205), which raises this issue, reads as follows:

"That said plaintiff is barred by:

(a) Estoppel

(b) Release

(c) Statute of frauds

(d) Waiver"

That is all! This does not appear to be the proper method of pleading a release (Moore's Form 8.107), the statute of frauds (Moore's Form 8.109) or waiver or estoppel (Moore's Form 8.112). See also Moore's Federal Practice, Vol. 1, p. 567, *et seq.* Perhaps a motion for a more definite statement and for a bill of particulars on these "affirmative defenses" would have been the proper course for appellant's counsel to take. *Bushwick* v. *Ford Motor Co.*, 1 FRD 19. Or, a motion to strike, *Nordman* v. *Johnson City*, 1 FRD 51. But that course might have delayed the trial. This pleading gives indication that counsel for appellee had before them Rule 8(c), Rules of Civil Procedure, 28 USCA following Sec. 723c, and merely picked out these elements as possible defenses.

There is absolutely no testimony in the record — not a single paragraph — in support of any of these affirmative defenses. For example:

1. **Estoppel.** This affirmative defense appears to be based upon the belief that appellant is estopped to claim damages in the amount of $34,343.00 because on June 30, 1945, appellant submitted its claim originally in the amount of $10,008.70. On March 12, 1946, the Chief of Engineers ruled that he had no authority to pass upon appellant's claim. On March 18, 1946, appellant received the balance due for performance of the contract and gave a receipt which reads:

"Final payment of Subcontract FF #5 to Government Contract #W-461-eng-10274, $1,000.00. Payment

in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision." (Ex. 46, R. 204)

Appellant's action in excluding its outstanding claim does not present a single element of equitable estoppel. There was no false representation made, no concealment and certainly there was no showing that the appellee altered his course or conduct because of the presentation of the claim or because of the execution of this receipt. Quite the contrary. The elements of estoppel are enumerated in *Coen* v. *American Surety Co.*, 120 F. 2d 393. At l. c. 398:

> "The essential elements of an equitable estoppel stated by the Supreme Court of Missouri in Blodgett v. Perry, 97 Mo. 263, 10 S. W. 891, 892, 10 Am. St. Rep. 307, and in similar cases are: '(1) There must have been a false representation or a concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; (5) the other party must have been induced to act upon it.' See also Bigelow, Estoppel, 3d Ed., 484; Sanders v. Chartrand, 158 Mo. 352, 59 S. W. 95, 97; Grafman Dairy Co. v. Northwestern Bank, 315 Mo. 849, 288 S. W. 359, 363. In the last cited case the court said: 'Estoppel must be pleaded with particularity and certainty. * * * nothing can be supplied by inference or intendment, and where there is ground for inference or intendment, it will be against and not in favor of the estoppel. * * * the burden is on the party who sets up the estoppel to make out the facts on which it rests.' "

2. **Waiver.** Certainly there was no "waiver" by appellant when it expressly reserved its right to claim dam-

ages. In *McDanels* v. *General Ins. Co.*, 36 Pac. (2d) 829 (1 Cal. App. 2d 454) waiver is defined at l. c. 832:

> "To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege — an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded or insisted upon. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. 25 Cal. Jr. 926-928."

3. **Release.** Certainly, it cannot be successfully claimed that the above-described receipt constituted a release of appellant's claim. There was no consideration to support a release. *Cuneo Press* v. *Claybourn Corp.*, 90 F. 2d 233, 235.

4. **Statute of frauds.** Frankly, we can see no occasion for the application of this defense under the facts disclosed by the evidence.

And, finally, it is crystal clear that appellee only paid the amount to which it is conceded appellant was entitled under its contract. Under any view of the case, therefore, the payment of the $1,000.00 would not be a consideration for the release of any claim which appellant might have against the appellee, whether it be for $10,008.70 or for $34,343.00. *Alaska Packers' Assn.* v. *Domenico,* (9 CCA) 117 F. 99, 102.

(2) **Is the Court bound by the Contracting Officer's Findings of Fact?** It has so been decided by the Federal

courts time and again. In *Evans Electrical Const. Co.* v. *Wm. S. Lozier, Inc., et al,* 68 F. Supp. 256, at l. c. 263:

> "The evidence in this case clearly establishes that the disputed question of fact arising under the subcontract in question has been submitted by the parties to the Contracting Officer and finally determined in favor of the plaintiffs by the said officer and the Chief of Engineers of the United States Army. The decision of said officers, concerning such question of fact, is conclusive and binding on this Court. *Plumley* v. *U. S.,* 226 U. S. 545; *Merrill-Ruckgaber Co.* v. *U. S.,* 241 U. S. 387; *U. S.* v. *John McShain, Inc.,* 308 U. S. 512; *English Const. Co.* v. *U. S.,* 43 F. Supp. 313; *Stiers Bros. Const. Co.* v. *Broderick, et al,* 60 F. Supp. 792; *Rego Bldg. Corp.* v. *U. S.* 99 Ct. Cl. 445; *R. C. Huffman Const. Co.* v. *U. S.,* 100 Ct. Cl. 80. No fraud or bad faith on the part of either of such officers, in the making of said decisions, is alleged or shown in the evidence. The Contracting Officer and the Chief of Engineers of the United States Army have determined that it was the intention of the parties to the subcontract in question that Mr. Carlisle was to be employed as Project Manager, and that his salary, at the rate of $9,000 a year, should be and is a reimbursable item of cost under said contract. The defendant concurred in such decision. The defendants did not change their position concerning such fact until after they were ordered, by the Contracting Officer in this case, to reimburse plaintiffs for the amount of the salary paid by them to Mr. Carlisle."

The Contracting Officer found as a fact (Subpar. 9, Ex. 44, R. 262) that as to Boiler No. 2 the appellant was delayed from September 5 to September 20 (15 days) plus the period from September 26 to October 18 (22 days), being a total of *37 days delay.* The Contracting Officer found as a fact (Subpar. 10, Ex. 44, R. 263) that as to Boiler No. 3 the appellant was delayed from August 15

to September 26, a period of *42 days*. He also found, (Subpar. 11, Ex. 44, R. 263):

> "The appellant has the reputation of being a very efficient operator. That firm was regarded by responsible engineers on this job as having performed the work of completing the power house in a very efficient manner. It is found that at the time the tube shortage was discovered the appellant altered its proposed method of operations and paced its work so as to eliminate actual work stoppages. This tends to give the appearances on the progress chart of the job (Exhibit B) that delays in the delivery of tubes and delays caused by misfit headers might not have been the sole reasons why the work was not completed in one hundred twenty days. However, the appellant very probably would have completed the work within one hundred twenty days had all necessary materials been on the job."

We believe, under the authorities above cited, and by virtue of the express terms of the contract between the parties (Art. VI, R. 27) that these Findings of Fact are binding on the Court. We believe it is equally well settled that the Court is not bound by the Contracting Officer's conclusions of law.

(3) **Amount of delay.** Independently of the Contracting Officer's Findings of Fact, does the record affirmatively show that the appellant was delayed 39 days? Appellant thinks it does so show. The District Court finds that the appellant was delayed as follows:

On Boiler No. 1	2 days (No. 32, R. 103)
On Boiler No. 2	7 days (No. 33, R. 104)
On Boiler No. 3	6 days (No. 34, R. 104)
	15 days

We assert that these Findings of Fact are not supported by any substantial evidence in the record. They are contrary to the record. The following illustrations show these Findings to be clearly erroneous:

Illustration No. 1: The Court found, as to Boiler No. 1, that appellant was delayed two days on account of *non-delivery of water wall tubes and headers.* (No. 32, R. 103). After stating that the evidence supports the fact that appellee was advised that these materials would be needed on *August 1,* and the appellee having admitted (R. 598) that they were not received until *August 17* (16 days late), the Court found that Ex. 17 (being the letter of 8-29-44, R. 170) disclosed the "first delay of one or two days." The Court completely misconstrues Ex. 17. It construes Ex. 17 as a statement of when delay started on account of *non-delivery of the water wall tubes and headers.* But this was not the purpose of that letter. The sole purpose of Ex. 17 was to establish when delay started on account of the *misalignment of the headers.* This purpose was established by direct evidence. (R. 169). And, in Ex. 17-A (R. 171), a diagram of the *misalignment of the headers* was offered and received in evidence. (R. 174).

What does the evidence in the record establish as to the amount of delay occasioned by the *non-delivery of the water wall tubes and headers?* It is a fact that the water wall tubes for Boiler No. 1 were required on August 1, 1944 (Ex. 4, R. 167) and the Court so found. (No. 32, R. 103). They were received on August 17, (R. 160). That means they were received 16 days late. The record further shows (R. 161) that Boiler No. 1 was scheduled for completion on August 23. The actual completion date was September 8 (R. 599) — 16 days late. The record, therefore, clearly shows that water wall tubes and headers for Boiler No. 1 were furnished *16 days late*, and the work was

completed *16 days late,* and the Court's finding that there was only two days delay, therefore, is clearly erroneous, and is not based upon substantial evidence.

Illustration No. 2. The Court found that appellant was delayed 7 days on Boiler No. 2 (No. 33, R. 104). This finding is not supported by the evidence. Under the Court's own Findings of Fact, if correctly computed, the delay was 38 days — not 7 days. There is an error of 31 days in the computation. Finding No. 33 concedes that the water wall tubes were required August 8, that the production chart (Ex. 62) shows that the appellant proposed 42 days for completion and that it was practically complete on October 27. The correct computation follows:

The production chart required appellant to commence	8- 8-44
Add: 42 days (1 mo. 12 days to complete)	1-12-0
Completion date, according to production chart	9-19-44
Actual completion date per Court's finding	10-27-44
Delay	1 mo 8 days (38 days)

Even if the Court's premises were correct (which they are not), the conclusion that appellant was delayed 7 days is wholly illogical. The Court declares that if appellant had maintained its schedule of 2.38% per day, it would have completed the work on October 20; that it completed the work on October 27, and that, therefore, appellant was delayed 7 days! This is the equivalent of declaring that—

Appellant should have completed the work on	October 20
It actually completed the work on	October 27
Therefore, the Court allows appellant damages for	7 days

— because the appellant didn't do what it should have done, to-wit, maintain its schedule of 2.38% per day. In other words, the Court allowed 7 days damage, as to Boiler No. 2, not because the appellee failed to deliver the materials in time, but because appellant didn't do what it should have done!

Furthermore, the Court's computation that from July 20 to September 3 is *42 days*, is quite inaccurate. It is actually *45 days*. Not that it makes any difference in this case, except to point out how completely inaccurate are the Court's findings.

Illustration No. 3. The Court's finding on Boiler No. 3 (R. 104), that appellant was delayed 6 days, is equally erroneous. Apparently this finding is based upon appellee's testimony at R. 600, which reads:

> "On boiler No. 3 they show forty-five calendar days to complete between July 25th and September 6th, an average of 2.22 per cent completion for each calendar day. The actual record is that there was seventy-one days and an average of 1.41 per cent completion per calendar day. The water-wall tubes were delivered on September 20th. The headers were delivered September 26th, on which dates, or rather, on the 26th their schedule shows 58 per cent completion, and following their schedule of an average of 2.22 per cent completion per calendar day, they should have been, —
>
> "Q. (Interposing): That was their estimate?
>
> "A. Their proposed construction schedule. They proposed to accomplish that from July 25th to September 6th, and on September 26th, which was the date the water-wall tubes and headers had been delivered, — following their own construction schedule they would have been completed on October 14th. They actually completed October 20th, which was also six days late."

Appellee's testimony (*supra*) shows that Boiler No. 3 was scheduled for completion on *September 6*. This is the date shown on the construction charts, Exs. 52-64, incl. Appellee concedes that this work was actually completed on October 20 (R. 601). According to our computation, based on the appellee's testimony, the completion of the work on Boiler No. 3, was delayed 44 days, computed as follows:

Date of actual completion	10-20-44
Construction schedule called for completion on	9- 6-44
Delay	1 mo 14 days (44 days)

Or, if we take the most favorable construction that could be given to this testimony, to-wit, that appellant should have completed on October 14, the correct computation would be:

Date on which appellant should have completed	10-14-44
Date on which construction schedule called for completion	9- 6-44
Delay	1 mo 8 days (38 days)

The point about each one of these illustrations is that the Court's Findings of Fact are wholly inaccurate under the record evidence and its conclusions are not based on substantial evidence. On the assumption that it has been demonstrated that the Court's findings are clearly erroneous and are not based upon substantial evidence, we shall now refer to the record evidence which establishes that the delay amounted to 39 days.

The Court finds as a fact that the contract called for completion on November 10, 1944, and that it was actually completed December 19, 1944. (R. 69, 98). The difference between these two dates is 39 days. Appellant's testimony

(R. 203) was to the effect that this entire delay of 39 days was caused by the appellee's failure to furnish the water wall tubes and headers on the date called for on the construction schedule. There is no dispute as to the dates provided for in the construction schedule, a schedule required by the contract between the parties. (R. 127).

This schedule provided for the delivery of the water wall tubes and headers as follows:

For Boiler No. 1	August 1	(R. 139)
For Boiler No. 2	August 7	(R. 139)
For Boiler No. 3	August 15	(R. 139)

Appellant's evidence shows that delivery was made as follows:

For Boiler No. 1	August 17	(R. 195)	16 days delay
For Boiler No. 2	September 20	(R. 162, 190)	43 days delay
For Boiler No. 3	September 26	(R. 162, 195)	41 days delay

Appellee's evidence shows that delivery was made as follows:

For Boiler No. 1	August 17	(R. 598)	16 days delay
For Boiler No. 2	August 20	(R. 599)	13 days delay
For Boiler No. 3	September 26	(R. 600)	41 days delay

The Contracting Officer's Findings of Fact show:

For Boiler No. 1	August 17	(R. 262)	— no delay
For Boiler No. 2	September 20	(R. 262-3)	— 37 days delay
For Boiler No. 3	September 26	(R. 263)	— 41 days

Thus it abundantly appears from the evidence that the delay on these separate segments of work range from 16 days to 43 days. All parties agree (*supra*) that delivery

on Boiler No. 3 was 41 days late. However, we cannot arrive at the overall delay by adding up the number of days delay on each separate item, as the Court does in its Finding No. 35 (R. 105). The decisive question is how much did appellee's failure to furnish these materials within the time designated in the construction schedule delay the completion of the entire project? Appellant's testimony shows that the delays occasioned by the non-delivery of materials were unreasonable, (R. 201) and that if it had not been for those delays the contract could have been completed on November 10, but that on account of the delay it was not completed until December 19 — 39 days late. There is no substantial testimony in the Record to the contrary. (R. 203).

Appellee attempts to minimize the damages by showing that appellant was not efficient because it failed —

1. To perform at the rate provided for in its "S" curve on the construction schedule.

2. To hire additional employees as the materials arrived.

There are at least two sufficient answers to the attack on appellant's efficiency of operation.

Answer 1. Appellee introduced Exhibits P to W, inclusive, to establish the "inefficiency of appellant" or to establish that it did not perform its work at the same rate provided for in the construction schedule. In every instance to which he testified as to appellant's "inefficiency," his statements were based upon a false premise. An "S" curve chart was received in evidence as Ex. 71 (R. 762). Please see.

The Court will observe from this chart that the percentage of performance per day is very low for the first

few days. Then the rate per day becomes much higher until near the end when the percentage of performance per day again is low. In other words, all along the "S" curve the rate of percentage of performance varies. It is never constant. Rate of performance does not follow, in engineering parlance, a "straight line curve" represented on this chart by the dotted line AB.

Nevertheless, in each instance where appellee called the Court's attention to the appellant's "inefficiency," he testified to the percentage per day that appellant would be required to perform by following a "straight line curve." This he admitted on cross examination. (R. 762).

The point is that the *average rate of performance* used each time by appellee in estimating time of performance *is not the time allowed by the construction schedule,* which all parties agreed was a reasonable schedule. The difference between the time allowed for completing various sections of the work according to a "straight line curve" and according to the "S" curve, is illustrated by the following chart based upon appellee's testimony.

Record	Section of work	Percentage of work to be done	Joslin's testimony — "straight line curve"	Actual time allowed by "S" curve
758	Brick work on Boiler #2	62	11	19
759	Brick work on Boiler #3	82	11	25
761	Ash hopper Boiler #2	75	3	5
761	Ash hopper Boiler #3	95	4	7

Since in each instance appellee commenced his argument on a false premise his conclusions as to appellant's efficiency can hardly be said to be reliable. This unreliability of the appellee's testimony is underlined by the record evidence that the appellee was at the site of the performance for only a few days and he never inspected appellant's work a single time from the beginning to the end of the performance.

Answer 2. There is no testimony in the record to support appellee's contention of inefficiency. The record contains the testimony of at least ten witnesses who were directly involved in the performance of this contract. Not a single witness criticized appellant's rate or quality of performance. Each of these witnesses testified for and in favor of the appellant. Appellee was personally present at the taking of some of the depositions of these witnesses. However, not a single question was asked of any of the witnesses about appellant's efficiency of performance. The testimony is all one way. The "Findings of Fact" by Major Thomas sums up his investigation (R. 264) in these words:

> "The appellant has the reputation of being a very efficient operator. That firm was regarded by responsible engineers on this job as having performed the work of completing the power house in a very efficient manner. It is found that at the time the tube shortage was discovered the appellant altered its proposed method of operations and paced its work so as to eliminate actual work stoppages. This tends to give the appearances on the progress chart of the job (Exhibit B) that delays in the delivery of the tubes and delays caused by misfit headers might not have been the sole reasons why the work was not completed in one hundred twenty days. However the appellant very probably would have completed the work within one hundred twenty days had all necessary materials been on the job."

In reviewing the question of damages, we wonder if it has occurred to the Court that appellant furnished to the Trial Court, aside from the testimony of its own employees, the testimony of witnesses who have absolutely no connection with or obligation to the appellant. Consider this chart:

No.	Name of Witness	Employer of Witness	Capacity in which Employed
.	Frank V. Wedlick	Cory-Joslin & Macnsons	Project Manager
.	Col. E. E. Taylor	U. S. Government	Contracting Officer
.	Maj. Homer D. Thomas	U. S. Government	Contracting Officer
.	Delbert C. Smith	Hercules Powder Co.	Power Division Engineer
.	Eustice C. Clay	Hercules Powder Co.	Chief Expediter
.	C. Howard Murphy	A-E-M	Contract Department
.	Lawrence J. Neubauer	A-E-M	Mechanical Engineer

Not only did each one of these witnesses testify in favor of the appellant on the disputed issues, but they testified, where qualified, on the matter of damages. Yet counsel for the appellee developed absolutely no testimony from these witnesses, one of whom was employed by the appellee, about appellant's efficiency, or about the question of damages.

Furthermore, has it occurred to this Court that the only testimony of any character offered in opposition to appellant's claim is that of the appellee himself who, according to his testimony, was only on the job *two times* during the entire time of performance. Let us compare the time of performance with the time the appellee was on the job as disclosed by his own testimony:

Total time of performance ..... 159 days

Time spent by Joslin on the job:

First time, August, 1944 (R. 712) ..... 14 days
Second time, December, 1944 (R. 713) ..... 7 to 14 days

He never talked to Borst from the day performance commenced until the day performance was completed. (R. 713, 714) Appellee's opportunity for observation, to say the least, was rather limited. Not much weight should be given his testimony as against the testimony of the seven non-interested witnesses named above. Our view is that the testimony on all issues was overwhelmingly in favor of the appellant.

B. **Principal question at issue — Measure of damages.** This brings us to the principal question at issue, to-wit: How much was appellant damaged? The determination of the amount of damages in this case, taken as a whole, at first appears to be a complex problem. The Trial Court's Finding of Fact No. 30 declares that it is a difficult question to determine (R. 103). However, by breaking up the elements of the damages into their component parts it is not difficult of accurate computation. The proof submitted five distinct items of damage, to-wit:

Item 1:	Extra cost of equipment rental	$ 2,255.50
Item 2:	Extra cost of Supervisory personnel (except Borst)	8,267.53
Item 3:	Extra cost of 90 days additional time and expense — Borst	2,542.31
Item 4:	Home Office Overhead	6,649.82
Item 5:	Loss in Efficiency	14,611.72
	TOTAL DAMAGES	$34,326.88

See Ex. 65, R. 267 to 330.

The general rule is that a contractor may recover damages incurred by reason of delay. The measure of damages occasioned by delay constituting a breach of the contract includes *all expenses and costs incurred by reason of delay.* The court in *Phoenix Bridge Co.* v. *United States,* 85 Ct. Cls. 603, l. c. 628, said that:

> "It is well settled that where a contractor is delayed by the Government in the prosecution of work under a contract he is entitled to recover as damages the expenses incurred by reason of such delay which would not otherwise have been necessarily incurred."

In *Rust Engineering Co.* v. *U. S.,* 86 Ct. Cls. 461, recovery was allowed for extra costs incurred by reason of delay by the Government, *but recovery was limited to costs incurred without profit.* Please read at l. c. 466, 468, Findings of Fact 7 and 8. At l. c. 476:

> "The decisions are uniform that a contractor may recover damages and extra costs directly attributable to and occasioned by delays caused by the defendant by reason of conditions encountered materially differing from those specified and contemplated by the drawings and specifications. The present claim comes within this rule."

The Court will observe that it was necessary for appellant to establish that the delays encountered were not merely the usual delays that are ordinarily encountered in the performance of any contract of this character, but that they were unreasonable delays. This fact was established (R. 202, 203).

Before we enter into a discussion of each element of damages, the Court should bear in mind that appellee knew within less than a month after performance commenced that there would be a delay of approximately 42 days, and that damages would be claimed in the amount

of $41,382.00. This is so because when appellant learned of the material shortages, it wrote a letter to the appellee on August 3, 1944 (Ex. 8, R. 91) giving notice that the delay in furnishing materials would delay final completion 42 days, and requested an addition to the contract price as follows:

Increase in actual costs (itemized)	$34,343.00
SSOA Builder's Risk bond	1,888.00
Margin 15%	5,151.00
Total requested increase in contract price	$41,382.00

For full details of this letter see Ex. 7.

Appellee not only knew that appellant estimated that the extra cost on account of this delay would be $34,-343.00, (*supra*) but he knew that a claim for damages would be submitted because of the delay. Appellee even attempted to get the A-E-M to cancel the contract with appellant and award it to him, the appellee. See appellee's letter to the A-E-M of August 12 (Ex. 10A, R. 719), which reads:

> "We note in our files the request of the Power Service Corporation for additional fee in the amount of $41,382.00 claim for delays because of material shortages. It is the belief of the writer that material shortages will develop throughout the life of the Power Service Corporation's contract, and these shortages will remain a constant source of controversy of claims filed by the Power Service Corporation.
>
> "We believe that it would be to the benefit of the Government and all parties concerned if legal steps were taken to compensate the Power Service Corporation for costs expended, together with a reasonable profit allowable by the Government, and cancel their contract, and complete Power House No. 1 with

our own forces. By so doing we will avoid possible future claims and litigation that might develop should this contract remain in force."

Furthermore, the Court should bear in mind that when the appellant originally submitted its claim for damages on account of this delay, through administrative channels, it expressly eliminated certain elements of damages (Ex. 29, R. 212) and asked only for the sum of $9,323.02 (later this was increased to $10,008.70, Ex. 35). However, when administrative relief was denied and when the appellee refused to pay any damages, the appellant filed this suit in which it now asks that its full legal damages be awarded.

Now let us consider each item of damage separately.

Item 1: Extra cost of equipment rental, $2,255.50. This element of damages is properly allowable under the decision of *Brand Investment Co. v. U. S.*, 58 F. Supp. 749. Because of the Government's stop order, plaintiff incurred the following expenses or damages:

Pay-roll expenses of superintendent, assistant superintendent, stenographers, watchman, and common labor and caring for premises	$1,554.99
Rent of office and purchase of materials and supplies to protect the premises during the period of the stop order	356.95
Expenses in connection with resumption of operations	182.70
Rental value of equipment, discounted because of nonuse	2,915.75
Main office overhead	1,071.47
Workmen's compensation, public liability and damage insurance	132.76
Total	$6,215.62

At l. c. 751 we find:

"The remaining questions in the case have to do with some items of alleged damages. The plaintiff asks for a part of the cost of maintaining its main office during the period of the delay, proportionate to the relation which this contract bore to the total amount of all of its then current contracts, plus a large additional amount to compensate for the fact that its executives devoted more than a proportionate part of their time to attempts to get the New Castle job under way again during the period of the stop order. The Government urges that nothing should be allowed for main office expenses, since it goes on regardless of what is happening on any or all of the contractor's jobs.

"We are allowing the plaintiff a proportionate part of its main office overhead. While such an element of damage can never be proved with mathematical precision, it is standard accounting practice to attribute main office expense to various company operations on some fair basis and we follow that practice. While it is probable that the plaintiff's executives did devote more than a proportionate part of their time to the New Castle job during the period of the stoppage, the amount of the excess has not been proved with measurable definiteness.

"The other disputed element of damage is the rental value of machines and equipment which the plaintiff had on the job, and which were necessarily kept idle during the period of the stop order. The plaintiff proved that machines of this type had a certain rental value. The Government urges that the plaintiff was not in the business of renting machines to others; that it would, probably, not have rented them even if they had not been tied up on this job by the indefiniteness of the duration of the stop order; that it has not shown that it had any other job on which it could have used them itself if they had not been tied to this job.

"We think that the plaintiff is entitled to recover on this item of its claim. We do not allow the full amount of the rental value, since we recognize that, if rented the machines would have suffered wear and tear which they did not suffer while idle on this job. But when the Government, in breach of its contract, in effect condemns a contractor's valuable and useful machines to a period of idleness and uselessness, we think that it should make compensation comparable to what would be required if it took the machines for use for a temporary period, but did not in fact use them. As a jury verdict, we allow the proved rental value, discounted by one-half because of the absence of actual use with its resulting wear and tear. We think that the contrary view expressed by the court in Phoenix Bridge Company v. United States, 85 Ct. Cl. 603, 631, should not be followed."

The courts of California allow damages on this item. *Milovich* v. *Los Angeles,* 108 P. 2d 960, 966-7.

Appellant's testimony on this item of damages appears at pp. 267, 275 of the Record and in Exhibit 65, item 1. It was necessary that all of this equipment remain on the job during the period appellant was delayed—to-wit, 39 days. (R. 274). It was used during this period. (R. 274). The prices were reasonable (R. 273) and were in line with OPA Regulations (MPR 134, Ex. 70, R. 398) of which the Court will take judicial notice. (R. 271). Invoices showing the actual payment of each separate item of damage were offered in evidence. Exs. 32-1, 32-2, and 32-3. (R. 274) Frankly, we do not believe that under the evidence and the law, any part of this item of damage can be seriously questioned. It had never been questioned prior to the trial. We believe the record entitles appellant to recover on this item $2,255.50

Item 2: Extra cost of supervisory personnel (except Borst) $8,267.53. In *McCloskey* v. *U. S.*, 66 Ct. Cl. 105, at l. c. 128:

> "It is insisted that the plaintiff could not go on with the contract when it found that defendant would not prepare the site within the time agreed upon and thereafter bring suit for damages, but we know of no such rule. It may be that plaintiff could have elected to cancel or abandon the contract, but it also had the right to perform its part of the contract and claim damages for the defendant's failure on its part, provided, of course, there was no acquiescence in this failure on the part of the plaintiff, and the evidence shows abundantly that this did not occur.
>
> "*Crook Co.* v. *United States,* 59 C. Cls. 593, is cited as supporting the contention of the defendant on this point. Some of the language in the opinion, as quoted in the brief of counsel for defendant, standing by itself, might justify such an inference, but when the case was appealed to the Supreme Court (270 U. S. 4) neither this language nor anything with the same meaning is repeated in the opinion. The case was affirmed, but it was on the ground of peculiar provisions in the contract. This court and the Supreme Court have repeatedly held that a contractor may recover the damages he has incurred by reason of delay wrongfully caused by the Government. See Crook Co. v. United States, 59 C. Cls. 348; Goldstone v. United States, 61 C. Cls. 401, and cases cited.
>
> "The evidence on the whole may be summed up by saying that the agents acting for the Government paid no attention to the verbal contract to have the site cleared on July 1, 1919, and were careless as to the performance of the provisions of the written contract with reference to how the site should be cleared.
>
> "Having found that the defendant was responsible for the delay in clearing the site and the failure to clear in the manner required by the contract, it be-

comes necessary to determine the amount that plaintiff was damaged thereby. * * *

"The evidence shows that if the site had been properly cleared at the time agreed upon, the contract could have been completed within the estimates placed on the several branches thereof by the plaintiff at the time the bid was made. This was proved in many cases by the actual offers of subcontractors who in some instances made a bid of an amount less than that fixed by plaintiff in the estimates. The damage or loss of the plaintiff was what he was compelled to pay over and above the cost and expense which would have been incurred had he been able to commence and proceed with the work in regular order upon a site prepared in the manner specified in the contract and ready at the date agreed upon. The total amount to be recovered by plaintiff will include not only the extra amount paid for work and material, but also the amount deducted from the contract price by defendant in making payment on account of damages for delay; the amount of the judgment obtained against plaintiff by the Special Service Flooring Corporation for delay caused by reason of the failure to furnish heat which the defendant had agreed to supply; for additional premium on the bond; additional payment for liability insurance; the additional amount paid for overhead and superintendents; and the cost of the overseer furnished by the bonding company, which by its contract with that company the plaintiff was obliged to pay; but the plaintiff will not be allowed anything for profit which it might have made as that sum was included in the contract price which, under the judgment to be rendered herein, it will receive together with the damages caused by delay."

The testimony on this item of damages may be found in the Record at pages 274, 279, and in Ex. 65, item 2. Exhibit 65 is more or less self-explanatory. This item of damage represents extra expense incurred by appellant during the 39-day period to keep the supervisory per-

sonnel on the job. These employees were entirely separate and independent of the appellant's labor organization. (R. 276). They were required to be on the job during the entire period of time. (R. 276). Wages, actually paid, together with Social Security taxes and expenses that were reimbursed to these men, amounted to $8,267.53. This was additional expense to which appellant was put on account of the 39-day delay and is another item of damage as to which there should be no question of allowance by the Court. Under the law and the evidence appellant is entitled to, and the Court should allow, damages on this item in the amount of.....$8,267.53

Item 3: Extra cost of 90 days additional time and expenses of Borst, $2,542.31. The right to the recovery of this element of damage was in question in the case of *Grand Trunk Western R. Co.* v. *Nelson,* 116 F. (2d) 823. See citations under Item 4.

The testimony on this item of damages may be found at pages 279, 284 of the Record, and in Ex. 65, item 3. The damage to appellant under this heading was real and substantial. Borst was charged with the entire responsibility of getting and performing construction contracts of a highly specialized type. While he is not an officer of the corporation, he has the responsibility of a General Manager. (R. 306, 307) No serious effort was made by counsel for the appellee to eliminate this item of damage. From the record it appears certain that had it not been for the delay in securing materials, and the consequent confusion on the Sunflower Ordnance contract, Borst would not have been required to spend 159 days on this contract. On account of these material shortages he was required to spend 90 days extra time on the job — time which otherwise he could have devoted to other business activities for the appellant. (R. 281, 282) During this 90-day period the ap-

pellant was required to pay him his salary and expenses for work that otherwise would not have been necessary. Instead, if there had been no delay, Borst could have spent that 90 days in productive work for the appellant at its home office. This item of damages is clear and was established with certainty. See the computation in Ex. 65, Item 3. This item should be allowed in the amount of ... $2,542.31

Item 4. Home Office Overhead, $6,649.82. In *Grand Trunk Western R. Co.* v. *W. H. Nelson Co.*, 116 F. 2d 823, at l. c. 838:

> "Appellee claimed $47,090.89 as overhead expenses in its schedule of losses which was submitted to the jury. Appellant insists that this item was not a proper element to be considered in measuring damages. Salaries of appellee's executive officers made up approximately one-half of the item, and there was included in it $8,500 for entertainment of prospective customers, $2,541.95 for maintaining a storage yard at Chillicothe, Ohio, $8,536.93 for traveling expenses and $5,605.05 under the heading 'sundries.'
>
> "In computing damages for breach of a construction contract, overhead expenses may be considered. These are not definable with precision but may be said to include broadly, the continuous expenses of the business, irrespective of the outlay on a particular contract. McCloskey v. United States, 66 Ct. Cl. 105; State of Indiana v. Feigle, 204 Ind. 438, 178 N. E. 435. The jury was not required to view appellee's loss as totally separate and apart from its general work. When the present delay resulted, a part of the general expenses of appellee's business was incurred in the supervision of the employees and the maintenance of the machinery and equipment on the job here in question and also to the injunction suits which produced the delay.
>
> "The propriety and business necessity of the itemized charges in the account were sharply disputed and

under the charge of the court, the jury were instructed to allocate to this job only a fair and reasonable amount of appellee's overhead, considering the supervision required and the proportionate amount of time and attention given.

"Overhead was one of the consequential expenses which the parties must have had in mind when the contract was entered into. This issue was submitted to the jury under a proper instruction. Appellant does not dispute the charge for material and supplies and labor."

Stewart v. *U. S.*, 63 F. Supp. 653, is a recent construction delay case in point, in which substantial damages were allowed. The method of determining damages on the item of home office overhead was the same as that used by appellant in this case. It received the Court's approval. At l. c. 656:

"Its home office overhead for the seven months is not shown. Plaintiff, however, did show its home office overhead for the 12 months' period beginning April 1, 1935, and ending March 31, 1936, and it is fair to assume that for the last seven months of this period its overhead would be 7/12ths thereof. This amounts to $20,196.79.

"This is the proportion of the total home office expense which the amount spent on this contract during the seven months period bears to the amount spent on all contracts during the same period."

The testimony on this item of damages may be found at pages 284, 310 of the Record, and in Ex. 65, Item 4. The method pursued by appellant in establishing the amount of damages under this heading is recognized by business firms and by accounting firms. (See the testimony of Accountant Benson at pages 392 to 396 of the Record.) It is recognized by the decisions of the courts, of which the *Grand Trunk* and *Stewart cases, supra,* are examples. The facts

are established so clearly by the testimony of Mr. Borst, and under the heading of Item 4, Ex. 65, that there cannot be any serious question about the amount allowable under this heading. An allocation, using "contract price" as the basis, is recognized as fair, but we did not confine ourselves to an allocation on this basis alone. An allocation, using "average number of employees" (which, of course, is the same as a "man hours basis") as the basis, is also recognized as fair, but we did not confine ourselves to an allocation on this basis. Instead, we combined these two bases and took the average percentage to arrive at the amount of overhead which should be allocated to or against the Sunflower Ordnance contract.

One of the factors in the formula used under Item 4 of Ex. 65 is the amount of overhead, $75,316.58, the correctness of which cannot be successfully questioned. Mr. Borst testified that this was the correct amount. (R. 291). The Treasurer testified this was the correct amount. (R. 359). Attached to the deposition of Mr. Gaffney, Treasurer of appellant corporation, and designated as "Exhibit A," there is an audit by a firm of accountants, Black, Hanson & Company, showing the overhead to be this amount. (R. 361, 362) Appellant also offered to substantiate this amount by introducing a sworn copy of the appellant's income tax return for the calendar year 1944. (Ex. 67). When an objection was made to the exhibit, the record shows at 389 as follows:

> "THE COURT: You have the testimony here. I don't see that the tax statement would help the Court any."

Another factor used in the formula is the "time element" of 39 days, or 1.3 months. The record establishes beyond any reasonable question that there was an actual

delay of 39 days, and that this delay was caused by appellee's failure to furnish the materials when needed for installation. The Accountant, Benson, at R. 393, 394, using the same facts as a hypothesis upon which to base his opinion, testified that it is considered sound accounting practice to use the average number of employees on the various jobs of a construction contract in allocating overhead to a particular contract. He testified that the amount of overhead would be $6,452.52. (R. 396) The small difference between his computation of damages and the computation submitted by witness Borst is probably accounted for by the fact that the Accountant used the time basis as 39/365 days, while Mr. Borst used, in lieu of 39 days, 1.3 months. Appellant considers that the allowance of either amount is a matter of discretion with the Court. We feel, however, that the damages to appellant in overhead expenses, on the record, amounted to not less than the sum of $6,649.82

Item 5. Loss in efficiency — increased cost of labor, $14,611.72. In 25 C. J. S., Damages, Delay in Performance — Material and Labor Costs, at page 575:

> "Where a party has been delayed by the other party in commencing performance, he is entitled to recover an additional amount which the delay has compelled him to pay for materials or for labor. He is also entitled to recover for his time and services during the period of delay, and the value of the services of his employees and equipment during the time of delay in the business in which they were then engaged, diminished by the compensation actually received by them for their services performed during the same period."

In *Clarke Const. Co.* v. *United States,* 290 F. 192, l. c. 193:

"Damages claimed, under notice filed, with the general issue, were foreman's wages, interest on money retained by the government, loss of return insurance premiums by delayed cancellation, additional labor cost, additional office expense, interest, and depreciation in equipment. That losses of such a character do not represent profits, and are not speculative, as claimed, is apparent. Items, many of them identical in kind with those here claimed, were allowed in Modern Steel Structural Co. v. English Const. Co., 129 Wis. 31, 108 N. W. 70. See 9 Corpus Juris, p. 791, par. 133, and note. It is urged, as against the additional labor cost, that it was not established, because the witness said he 'arrived at it by taking into consideration what the mill work actually cost him to install it, and what he estimated it would cost to install it.' That method is unobjectionable. Guerini Stone Co. v. Carlin, 240 U. S. 264, 280, 36 Sup. Ct. 300, 600 L. Ed. 636, and cases cited."

Also, please see *Feigh* v. *U. S.*, 8 Ct. Cl. 319, at l. c. 323, for a full discussion of this element of damages.

Appellant's testimony on this point may be found as follows:

Name of Witness	Pages of Record
Borst	309-330
Murphy	349-350
Col. Taylor	352-354
Wedlick	356-357
Nelson	376-382
Hobbs	387-389

This item of damages, in our opinion, constitutes the only real controversial element of damages in the claim, but nevertheless it represents a real and substantial loss suffered by the appellant in the performance of its contract. There can be no question but that this type of

damage is allowed in "delay cases." The *Clarke* case, *supra,* for example, in plain words states that the method used by appellant in this case is unobjectionable. It cites a Supreme Court case as authority for such a method. The method used, and approved in the cited authorities, is to ascertain what performance actually costs and estimate what it would have cost if there had been no delays, and the difference is the damage suffered and allowable as damages. A large chart, received in evidence as Ex. 66, graphically demonstrates this loss of efficiency.

Counsel for appellant respectfully requests the Court to frequently refer to this chart while considering the evidence on this element of damages. The testimony (R. 303, 330) follows this chart.

At the conclusion of the contract, on December 19, the labor payroll amounted to (R. 310)	$227,418.27
On November 10, the date on which the contract should have been completed, the payroll amounted to	181,467.26
The difference is (R. 310)	$ 45,951.01

While this might at first glance appear to be the loss, we concede that it is not a fair method of approximating the loss because if the contract had been completed within the 120 days, that is by November 10, it would have been necessary to employ a larger number of employees than was actually employed, and the payroll would have been greater than $181,467.26. Witness Borst analyzed, described and approximated appellant's loss. The claim is that because of the delays there was an increase in the cost of labor, that is to say, the cost of labor to perform the contract one hundred fifty-nine days was greater than the cost of labor would have been if performance could have been accomplished in 120 days. Or, another way of putting it is to say there was a loss of efficiency.

If all of the materials would have been available at the times called for in the construction schedule (please refer to the chart, Ex. 66) —

The first boiler could have been completed in	100	units of time.
The second boiler could have been completed in	90	units of time.
The third boiler could have been completed in	87½	units of time.
The total estimated time would have been	277½	units of time.

Actually, however, on account of delays —

The first boiler required	105	units of time.
The second boiler required	105	units of time.
The third boiler required	105	units of time.
The total actual time required was	315	units of time.

Or, putting it another way, as shown on Ex. 65, it looks like this:

Operation	Units normally required	Units actually required	Loss of Efficiency
Boiler #1	100	105	5 %
Boiler #2	90	105	15 %
Boiler #3	87½	105	17½%

Total loss of efficiency	37½%
Average loss of efficiency per boiler (1/3)	12½%

There is real merit in this element of damages. The claim that there was an increase in the costs of labor is based on solid ground. Two examples in our profession will make appellant's position clear to the Court.

Example 1. Suppose that an attorney presents a brief to a trial Court purporting to cover all questions involved in a case that has been tried. Let us suppose that after the Court spends a few days on the brief it finds that counsel has failed to brief a point which should have been covered, and that the Court then directs the attorney to furnish an additional brief; that the additional brief reaches the Court six weeks later. In the meantime the Court may have tried a dozen other cases. When the Court resumes consideration of the case, it would take time to again become familiar with the facts necessary to the writing of the opinion. If all of the law had been furnished in the first brief the Court would have been able to write its opinion in a shorter time and with much less work in the library.

Example 2. Or, let us take any complicated case that is submitted to a lawyer. If the client will furnish all of the facts to the attorney on the first interview, the attorney can write his brief and draw his petition at a minimum expenditure of time and work. But if the client fails to furnish the needed facts and the attorney must attempt to get his work done in three or four separate attempts, it takes much more time to handle the case than it otherwise would have taken. I am sure that the members of this Court are not so far removed from the practice of law as to fully appreciate the point that is made by this example.

Ericsson Co. v. *U. S.*, 62 F. Supp. 312, is directly in point. There plaintiff recovered damages in a construction project caused by defendant's delay in furnishing approved shop drawings. Because of this delay plaintiff was unable to follow the sequence provided in the "production schedule." At l. c. 316:

"Most of the delay was caused by the failure of the architects to make tentative approvals or to submit to Washington the shop drawings approved by them, but a substantial delay occurred in the approval by the Housing Division at Washington. Had the full size drawings been furnished to plaintiff in time to submit and obtain approval of shop drawings in the ordinary course, the finished stone would have been delivered to the site of the work by the time the first floor slabs were poured and plaintiff was ready to proceed with the first-story walls. Instead, the delay in receiving the stone delayed laying the brick first-story walls. This, in turn, delayed the next operation in the sequence, and the delay continued accordingly into each of the classes in the planned sequence of the work.

"Because of the disruption of plaintiff's planned operations and delay in the early units of the planned sequence, completion of the entire job was delayed. At least 47 days of delay in completion of the entire job is attributable to the delay of the defendant in furnishing full size detail drawings for stone work and its failure to cooperate in plaintiff's efforts to secure approval of shop drawings in the absence of full size drawings."

So it is with the appellant in this case. If all of the materials had been on the job so as to enable appellant to follow its normal procedure, the work could have been done more efficiently and more economically. At great pains witness Borst obtained from the payrolls the actual cost of the "repeat" operations on the three boilers. These records show that the actual cost was $131,505.47. (R. 311). In his explanation of Item 5, Ex. 65, Borst, after

relating the facts, expressed the opinion that this sum was 12½% in excess of normal cost. (R. 327). In other words, it represented 112½% of normal cost and that the normal cost, or 100%, would have amounted to only $116,893.75. (R. 328). The difference between the actual cost and the normal cost is $14,611.72 which represents a definite and certain loss suffered by appellant on account of the appellee's delay in furnishing materials.

Appellee attempts to refute appellant's theory of an increase in labor costs by showing (R. 674, 678) that in appellant's estimate of the costs it specifically quoted to the appellee that the cost of erecting the respective boilers would be:

Boiler #1	$32,800.00
Boiler #2	32,800.00
Boiler #3	33,400.00

But the "cost to the appellee," or the charge against the appellee, and the "cost of performance by the appellant" are two different things. For example, if a lawyer were offered three cases like the present one, by three separate clients, the fee in each instance would probably be the same, although it would be much easier to try the second and third cases than it would to try the first case. The time and labor on the second and third cases would be considerably less, at least so far as the library work is concerned, but the fee would be the same and the profit (excess of contract price over cost of performance) would be greater.

CONCLUSION.

In conclusion, the five elements of damages are as follows:

Item 1:	Extra cost of equipment rental	$ 2,255.50
Item 2:	Extra cost of Supervisory personnel (except Borst)	8,267.53
Item 3:	Extra cost of 90 days additional time and expenses — Borst	2,542.31
Item 4:	Home Office Overhead	6,649.82
Item 5:	Loss in Efficiency	14,611.72
	Total damages	$34,326.88

We submit that the Trial Court's determination of the damages is not supported by any substantial evidence, and that it failed to follow any recognized method of measuring appellant's damages. The decision below should be reversed and the cause remanded with instructions to enter judgment for damages in the amount established by the evidence. We believe that amount to be $34,326.88.

Respectfully submitted,

LANCIE L. WATTS,
Attorney for Appellant.

Dated October 25, 1948.